Exhibit D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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RYAN MELVILLE, on behalf of himself
And all others similarly situated,

Plaintiff,

v. 21 CV 10406(KMK)

CONFERENCE

HOP ENERGY, LLC,

Defendant.
----------x

United States Courthouse
White Plains, N.Y.
November 29, 2023

Before: THE HONORABLE VICTORIA REZNIK, Magistrate Judge

APPEARANCES

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*Proceeding recorded via digital recording device.

THE COURT: Good morning.

This is the Melville case. Will counsel please introduce themselves, starting with the plaintiff.

MR. McINTURFF: Yes. Good morning, your Honor. This is Burkett McInturff. I also have with me my colleague, Daniel Brenner. We're from the law firm Wittels, McInturff, Palikovic on behalf of plaintiff in the proposed class.

MR. SHUB: Good morning, your Honor. Jonathan Shub, Shub & Johns, on behalf of plaintiff as well.

MR. McLAUGHLIN: And good morning, your Honor. This is Matthew McLaughlin. I'm joined with Kevin Saunders from Nixon Peabody on behalf of the defendant.

THE COURT: All right. Good morning, everyone.

So we're here for a status update to address the issues that the parties submitted in a joint status letter on November 21st. I had been hopeful after receiving the previous letter that the parties were working towards a resolution, but it seems like there's a hiccup in the process.

So I was looking back at my notes from our conference. So my first question is regarding sampling and the sampling methodology. So where we had left it is that I had told the parties to meet and confer regarding the sampling methodology and to report back to me as to the status of those negotiations with the goal of moving towards a resolution of getting the sample contracts produced.

So, Mr. McInturff, where do things stand with the sampling protocol, or the sampling methodology?

MR. McINTURFF: Sure, your Honor.

So we have taken a bit of an alternate path. As relayed in our initial status update, plaintiffs had proposed a sampling methodology that the defendants were not willing to agree to, so, as a fallback, we agreed to review the contracts that defendant had pulled in the case called ^Calorie v. Hop Energy, which is pending in Pennsylvania Federal Court. We reviewed those sample contracts. They were produced to us I think on the 17th and we reviewed them within a week and raised some questions regarding the data that we had been given trying to line the contracts up with the actual pricing data that we have. We raised that issue in the letter that was submitted to your Honor last week, but -- and I'm happy to report that yesterday afternoon the defendant provided the information that we had requested. We reviewed -- you know, last night and this morning, we reviewed the additional information that was requested.

We do have follow-up questions, but we're hopeful that if the follow-up questions about some of the issues that the new information has caused to surface, we're hopeful that if those questions are answered promptly, that we can then be in a position, from plaintiff's standpoint, to sort of bypass the sampling process and simply propose a stipulation with the

goal of being able to agree with defendant that, for any given purchase reflected in the purchasing data that they've produced, the parties would agree that that purchase was governed under, you know, a certain contract, whether it be one version or the other. So that would be the goal is to line up the actual purchases that are the subject of the litigation with the underlying contractual terms.

As soon as we get answers to our questions, we'll propose a stipulation. I'm hopeful that we'll be able to stipulate. If not, we'll have to come back to your Honor with plan B on how to deal with this issue, but that's where we currently stand.

I will say that we -- in order for this to work in a timely fashion given Judge Karas' clear signal to the parties that we're to, you know, pursue discovery with dispatch, we need quick turnaround on these items because, as your Honor can appreciate, we've been working on this issue now since July.

THE COURT: All right. So, at this point, it sounds like you have some follow-up requests. Have those been communicated to Mr. McLaughlin?

And what's your position, Mr. McLaughlin?

MR. McINTURFF: Well, I -- if I could just respond, your Honor.

One follow-up request has been communicated. The other ones that relate to the information that was provided

yesterday afternoon have not been transmitted.

THE COURT: Okay.

Mr. McLaughlin, what is your position on the status of this compromise agreement about the contracts?

MR. McLAUGHLIN: Sure, your Honor.

Just a couple of corrections from defendant's perspective.

We did not say we were not willing to agree to the proposed sampling methodology that plaintiff proposed. If your Honor recalls, the whole reason we were discussing a sampling of contracts was to determine whether the relevant language at issue in this case had changed over time or in various branches in the contracts that are at issue. And we had advised the plaintiff that we had pulled running searches of the different branches over the different years in the other case contracts that we thought was the best way to identify whether there were any changes in that language and, if not, then the parties could likely potentially stipulate to some language about which -- you know, what is the operative language in the contracts without reviewing all ^200,000 contracts. That was our understanding of the process.

What we got instead from plaintiff after our last conference was a proposed stipulation and court order on the front end rather than after any review of contracts that said here's a -- that included a methodology of us pulling an

additional 200 contracts based on their proposed methodology and then giving them carte blanche to ask us for any additional contract samples that they wanted thereafter and us agreeing to a number of stipulated facts in their proposed stipulation.

What we said was we would indeed run the sampling search for the additional 200 if they wanted us to, but we were not willing to enter into any stipulation at this point, because I don't believe that was contemplated by anybody at the last conference, and that we would -- and we weren't going to agree to have an ongoing sampling protocol where they tell us after 200 that they want 200 more. So that was our -- we said -- and it was in writing. I communicated it to Mr. McInturff. We would run the additional 200, but that was all we were willing to do. And I think that was consistent with what was discussed at the last conference.

Now, we are -- what he's now asked us for is, if I understand -- you know, we're happy to answer the additional questions, but the questions are sort of changing the goal post. What we're hearing now is they want to be able to use these contract samples to support some damages methodology and tie it to customer account data. I mean, that goes far beyond what we were talking about in terms of pulling sample contracts. And so I do think that that is different than what we had agreed we would do.

MR. McINTURFF: Can I respond, your Honor?

MR. McLAUGHLIN: The questions are the follow-up questions with respect to -- so notwithstanding that, we did turn over some additional -- he asked some questions on the database data that we provided that was not something that was part of our last conference at all, but we have turned over a huge volume of sales data to the plaintiffs. They're now asking questions as to what -- you know, how do we tie some of the sales data to the sample contracts that we've seen. You know, that's, to me, outside the scope of what we were talking about.

And so we have been providing -- I think have been very forthcoming with information, again, geared toward the parties' mediation scheduled for next week because that was sort of the global understanding, that we would focus on what the parties need to get through mediation so that we're not wasting money that could be best used for other purposes, assuming we can get to a settlement, but that seems to be what plaintiff wants to do, which is just spend money and create problems or raise issues that don't really exist.

So the bottom -- so the short answer to your question is we're prepared to do the 200 sample -- additional contract samples, but this never-ending back and forth of raising questions and then, you know, trying to figure out a stipulation at this stage, when we haven't even -- they haven't even told us if they're satisfied with the language in the

contracts I just think is premature.

MR. McINTURFF: Can I respond, your Honor?

THE COURT: Sure.

MR. McINTURFF: This is Burkett McInturff.

This is very simple and, with all due respect to my colleague, I don't believe that is a productive approach to this simple issue.

This class action accuses the defendant of breaching the pricing term in its customer contract. And the issue that we're talking about here today arose from the fact that we said, defendant, why don't you tell us which customers are covered by this pricing term and other pricing terms and what we heard back was we can't, we can't do that. So then we started talking about a sample to review the contracts. At the same time, the defendant has now produced the charging data that we had requested for potential class members.

As an aside, the defendant has represented to your Honor that there are 200,000 contracts, yet they've only produced charging data for 114,000 customers. By the way, we asked the defendant to explain that discrepancy. They have not responded, but that's an aside.

So the question raised by this case is what is the relevant contractual pricing term for each of the defendant's customers and did they follow that pricing term with respect to each of the purchases the customers made. So they've produced

the sales data, and the sales data shows that customer purchases were made pursuant to certain plans. So once we get the sales data, we have to line up the contractual term with the plan the customer was under, again, because defendant doesn't have this information in readily available format, which has been a surprise to everybody involved in this case.

What we are entitled to and what we need to do with this is to look at each individual charge within this database and be able to determine what was the pricing term that governed that charge, and then we can assess to put on our case to show that the pricing term was violated.

For example, in the main plaintiff's, Mr. Melville's, instance, we know that the contract that governed all of his transactions said that he would be charged the promotional prevailing retail price for first-year customers. We got an expert. Our expert went out and determined what the prevailing retail price was and it showed drastic discrepancies between what is available -- publicly available data about prevailing retail prices and what Mr. Melville was charged. Again, this is a class action, so we can -- Mr. Melville can represent any other similarly situated customers and we're trying to determine which customers are similarly situated. That's the purpose of this exercise, what contracts apply to which customers in which geographies and which purchases.

So for defense counsel to claim that all we're doing

is looking to see if the pricing term changed across various contracts is only half of the picture. The other half of the picture is to connect that pricing term to purchases. We're not trying to do this to spend defendant's money. We're trying to do this to prosecute our case, which is within our rights. And quite frankly, for defense counsel to sit here today and to claim that this is a never-ending process and that it's done simply to raise litigation costs is disingenuous.

Again, what we said at the beginning of the call -- what I said at the beginning of the call was we received yesterday afternoon, at 4:30, an answer to our question which we, unfortunately, had to raise to your Honor that has caused additional questions. We think we'll be in a position, if we get our questions answered promptly, to propose a stipulation to defendant to put this issue behind us, because all we're trying to do is identify which purchases were covered by which contracts during which period, which, again, surprisingly, defendant could not easily tell us.

So what I think is the appropriate thing to do is we will transmit our remaining questions. Again, our outstanding question is you've represented that there are 200,000 contracts in the database, but you've only produced data for 114,000 accounts. We asked defendant about that on November 21. It's now been more than a week and they haven't responded. But we have a few additional questions based on the data that was --

the information that was produced yesterday. We're going to transmit that today and we ask that the defendant respond within three or four business days. I think that's the best way to move forward. We're trying our best to work past the stipulation -- to work to a stipulation because, again, this issue has been outstanding since July.

THE COURT: So, Mr. McInturff, with respect to determining the pricing terms that apply in the contracts, is that something that is determined by looking at the contracts themselves, meaning the pricing terms -- the sample that you're going to get has pricing terms in it and so your -- so you're getting information about whether or not those pricing terms are similar across the contracts that were produced? Is that accurate?

MR. McINTURFF: So the defendant has already produced several hundred contracts that it had produced in the other case. We reviewed those contracts. We've sort of broken them down into the various types that they exist. Now we're trying to match up those contracts with the purchases that the defendant has produced within its data.

So, for example, if your Honor was a customer in 2022 and you were on plan XYZ, we're trying to match up plan XYZ with the contracts. Again, our goal here is to stipulate with defendant that every purchase made under plan XYZ was pursuant to this contract or to that contract. It's not a very

complicated issue.

We've reviewed the contracts and then when we looked at the data, you can't tell from the data they've produced which contract applies automatically. The contracts are not -- they're not such that you can just -- you can just understand from the charging data which one applies. So we're going to try to link the two with a stipulation that says if a customer was charged under this plan, this contract applies.

We're -- again, we've taken -- we would have preferred a much more methodologically sound sample contract, but in order to move forward on this issue, we have taken defendant's methodology, we reviewed the contracts defendant produced, we've issued these follow-up questions to try to link up the contracts with the data, and we're prepared to propose a stipulation.

Again, if defendant is -- if defendant can't agree to a stipulation at that point, we're going to have to get a plan B and we're going to request that the defendant simply produce the 200,000 contracts and then we'll do our analysis, because, as your Honor had originally suggested in October, we didn't want to take the 200,000 contracts because it was going to be substantial additional work for us, but this process has now proven to be just as much work because, unfortunately, I don't believe the defendant is taking this process seriously.

THE COURT: Okay. Well, putting aside those

issues --

MR. McLAUGHLIN: Your Honor, can I respond?

THE COURT: Yes, you can, Mr. McLaughlin, but let me ask you first, putting aside whether you thought that that was part of the agreement in doing sampling, what is defendant's problem with providing the linking data between individual charges or purchases with particular contracts? Is that information that the defendants have and can obtain and can provide?

MR. McLAUGHLIN: So, I -- again, possibly, but Hop has all of the contracts. The contracts -- but they are not -- they are not linked in the system in a way that we can say this particular transaction or this account we can easily match up to the contract. We can -- it's a manual process that can be done.

But I think the more important fact is, and it's the answer to the question that your Honor asked Mr. McInturff, which is do the contracts set forth the pricing. They really don't in the way that is relevant here. The contracts across the Hop empire are essentially the same. They have either a fixed price or a capped price, and that changes depending on the day that the particular customer and the geography of the particular customer enters into that contract. It depends on what the price of heating oil is at the time that they set that cap or fixed price. Those are essentially the two types of

contracts, but then they all say, effectively, either at the end of your allocated number of gallons of oil that's set forth in the contract, and that's variable, too, or at the end of the term of your one-year contract or if our -- you will revert to our prevailing retail price. And if our prevailing retail price on the day of your delivery is lower than your capped price, you'll get the lower of the two. And that language appears, from our view and from the document -- from the sampling that we sent to plaintiffs from the other case, that operative -- that concept that you're going to get either your standard contract price or the prevailing -- Hop's prevailing retail price, is consistent.

And so there's not really a need, from my perspective, to tie the contract -- the specific contract to the database, to the pricing, because that is what all of the contracts say.

And then this case, the Melville class, and I raised this in the last call, is limited to those customers that had the first-year promotional concept built into their contract, and that was language that was in lieu of this prevailing retail rate price that exists in Hop's contracts in all of its branches, and that is limited to Connecticut accounts in a several-year period. And we had talked about this at the last conference.

So when plaintiff is now asking us for all of this

information, you know, going beyond these Connecticut customers that have the first-year promotional language that is the class that they have pursued in this case, I just think it's not proportional and we should be focused on the issues at issue in the claims in the complaint and not all of the customers beyond that. But at the end of the day, that's the language that's relevant.

MR. McINTURFF: Your Honor, this is Burkett McInturff.

THE COURT: I guess what I'm confused by is you have sample contracts that you produced, Mr. McLaughlin. Are those sample contracts limited to that promotional language in Connecticut over certain years that you believe are the subject of this class?

MR. McLAUGHLIN: No. And that's -- we gave them beyond that. We were trying -- so we gave them -- because the ^Calorie case in Pennsylvania is a much broader class. That includes the Melville class plus anybody that has contractual language related to prevailing retail price. So we gave them the snapshot of all of our contracts. What they will see is that the only place that that promotional language appears is in Connecticut. They didn't want to do searches, which was another option, of that phrase of our -- you know, of our contract database, to produce samples of contracts that just have that language, which also made sense to me, but that's the

universe, from my perspective, of the relevant contracts. But they have much more -- they have -- they've been given contracts beyond that.

And their proposed protocol for 200 additional contracts doesn't seek to limit it to the prevailing or first-year customers either. It seeks, you know, a sample across Hop's entire customer database, which, again, is not going to get them what it seems like they should be interested in, which are the contracts at issue in their proposed class.

THE COURT: Well, what I understood now is that you have a compromise on the table, which is that Mr. McInturff and the plaintiff has agreed to take those ^Calorie sample contracts which they've reviewed and use that as the basis of their review of the contract language and now have follow-up questions with respect to those contracts. And the specific questions have to do with linking individual charges to particular types of contracts. So I thought that was what's on the table, not these additional 200 contracts. That seemed to be an initial proposal that's not what you're doing now.

So, at this stage -- so it sounds to me like you have individual charges -- you have charges that were provided to you, Mr. McInturff, but in the aggregate, sort of charges in a database, and then --

MR. McINTURFF: Database --

THE COURT: Is that right?

MR. McINTURFF: Sorry. Yes. Database data.

THE COURT: Right. So that you have database data with individual charges, but you're not able to link it with specific contracts at this point.

MR. McINTURFF: Correct.

THE COURT: And then you separately have a sample of contracts with the promotional language plus other language that's relevant to your case and you're trying to take those 200 contracts, or however many you received, and link it to the individual charges in the database.

I guess the question is, Mr. McLaughlin, is it your position that you don't need to tie that data together because all the sample contracts you've provided that are relevant -- you know, those individual -- the language is the same, so whatever charges you have applied to them all equally, meaning there's no reason to distinguish between one charge or the other to a particular contract?

MR. McLAUGHLIN: No. I think the charges will be different because the price -- the capped or the fixed price would likely be different. And so it would -- on any particular delivery for those particular customers, the price would be potentially different because they entered into contracts at different periods of time. So that would be different. But sort of the pricing differential, whether they're being charged the contract -- the capped price or the

fixed price versus the prevailing retail price that was in effect at the time of the delivery would be the same. The numbers would be different, but they have all the numbers.

THE COURT: So how are they looking at those numbers in a database and knowing which contract has the prevailing promotional -- the prevailing rate promotional language and those that don't? How would they know that looking at the database you provided?

MR. McLAUGHLIN: Well, they wouldn't -- just looking at the database, they wouldn't, but there is not a contract that doesn't have that language that we've found. They all revert to that language.

THE COURT: So it's your position, it sounds like, that, because all the contracts have the same language, there's no need to tie it to individual charges in the database --

MR. McLAUGHLIN: Correct.

THE COURT: -- because it doesn't change?

So, Mr. McInturff, from your perspective, if defendants are saying all the contracts have the same language, why is it important for you then to tie them to individual charges? It sounds like you have the information potentially in the aggregate to be able to propose a stipulation along the lines of what you had in mind.

MR. McINTURFF: So just to be clear, defense counsel is representing on the record that the contract that

Mr. Melville has for the variable rate charges that he was charged applies to all customers of Hop that were charged a variable rate for home heating oil?

MR. McLAUGHLIN: No, that's not what I'm saying. I haven't made any such representation. What I have said is the concept of the prevailing retail rate is set by the company at the branch level at various points in time and that whatever delivery happened -- whatever delivery happened on that delivery date for that branch, the customer, if they are being charged their prevailing retail rate or their first-year promotional retail rate versus their capped rate or their fixed rate, that number -- that number is the number. That number is not going to appear in the contract. It's not stated because that number changes. So it's not going to be in the contract itself. It will be in the database. You have that information in the database. You have all of the information about what every customer was charged for every delivery.

MR. McINTURFF: So, your Honor --

THE COURT: Go ahead.

So when you have the actual contract, you have the customer name or data that you can link to the database?

MR. McLAUGHLIN: Yes.

THE COURT: Or you're saying --

You have that, Mr. McInturff?

MR. McINTURFF: Well, let me back up because this is

a very simple issue that has gotten confused and I think the first thing to understand is the -- when we filed the case after we won the motion to dismiss, the defendant moved to stay our case pending this other action in Pennsylvania and Judge Karas made very clear that the other action in Pennsylvania is about capped price customers.

So the defendant offers various products. They offer a capped price product where your rate is not going to go above a certain level. They offer a fixed priced product where your rate is going to be the same no matter what you consume. And then, as Mr. McLaughlin represented, after a certain period of time, customers roll from those capped or fixed priced products to variable rate products. Our case is about the variable rate people. Judge Karas made clear that the Pennsylvania case is about capped price products and our case encompasses variable rate products. So when you go and you look at the database, what you see is there are capped price charges, there are variable charges, there are fixed price charges.

The purpose of this exercise is, again, Mr. Melville brought a breach of contract, a breach of duty of good faith and fair dealing claim, saying if you look at the contract that I have, it says my variable rate is going to be the promotional prevailing retail rate for first-year customers and I've calculated that rate and you charged me more than that rate; therefore, you breached the contract and violated the duty of

good faith and fair dealing.

The question here is what language applies to defendant's other variable rate customers. If your Honor will recall, in July, with defendant's prior counsel, your Honor ordered the company to essentially produce all of its contracts. At that point, we found out that they couldn't produce -- that they didn't have form contracts, they didn't have like a template that they used and, instead, they're storing these 200,000 contracts with each individual account. The question we're trying to answer is, for every variable charge in this database, which is covered by our class, as ruled by Judge Karas, for every variable charge, what is the contractual pricing language.

The goal of what we're doing here is we're trying to stipulate with defendant what that language is. They've produced a bunch of contracts from the Calorie case. There is substantial overlap in the contractual language across the geographies. It's not identical, but it is very, very similar. And so our goal is to stipulate with the defendant that this language applies to variable rate purchases.

Defendant has raised the issue that the language of Mr. Melville might be slightly different than the language of other customers in other states. We can certainly deal with that in the Rule 23 process, but we need to begin. We need a starting point where we can say these customers served on the

variable rate at this time had this contract in effect, which, again, it shouldn't be that hard, but since we've got the charging data, you can't -- when you look at the database data, you know, it says customer A charged a variable rate, but what you can't do is look at that fact that they're being charged a variable rate and then understand that maybe their pricing language was like Mr. Melville's or maybe it was like somebody else's who had slightly different pricing language. That's what --

THE COURT: Mr. McInturff, how many contracts total would you be seeking to tie to that database?

MR. McINTURFF: Potentially, I think, in terms of contractual pricing language, as far as I know now, in terms of variable contractual pricing language, I think there's probably two. I think there's probably two variations. Maybe there's some additional minor variations, but there's not a lot of variation between the pricing language across time and geography.

THE COURT: Well, my question is slightly different. Sorry. In terms of the sample.

So you have a sample of contracts the defendants have produced to you. At this point, you have follow-up questions. The follow-up questions include questions relating to allowing you to tie the database pricing charges -- sorry, the database charges with those contracts, correct?

MR. McINTURFF: That's correct.

THE COURT: Okay. So how many of those contracts -- and from what Mr. McLaughlin said, that would be a manual process because they don't seem to have that data otherwise. How many contracts are we talking about that would require this tying exercise? Is it the 200 Calorie contracts? No, it's for purposes of you getting to a stipulation, which is what we're focused on.

MR. McINTURFF: Oh. So, again, we've got the 200 Calorie contracts. We've looked at them. Once we can tie -- so there's -- you know, there's actually not 200 in them, there's some duplicates, but we've looked at them, and once we can -- once we get to the bottom of the data that's been produced, the pricing data, in terms of identifying -- because, again, these contracts, they start with the -- either a capped price or a fixed price and then you get shifted to a variable rate plan. So once we understand where in the data the customer's then put on a variable rate plan, what we intend to do is propose to defendant a stipulation that says, you know, everybody that was on this particular variable rate plan as reflected in your data, you know, code, because all of these names are in code. So like if you're on code XYZ, this contract applies to you. And we're prepared to do that. We've analyzed the 200 contracts. We're prepared to make a proposal. Personally, I am not confident the defendant is prepared to

agree, but we're prepared to make a proposal to say, you know, for every time someone has a charge under this particular plan, here's the contract that applies to govern the pricing language that governs that particular charge. That's our goal.

THE COURT: You have that proposal now, before getting -- having your follow-up questions answered? Because I'm --

MR. McINTURFF: No. We can't fill in the blanks. Like we have the proposal.

THE COURT: That's my question.

So you have this proposal, but I'm asking specifically how many contracts would you be asking defendants to specifically tie to the charges in the database? What is the -- that, to me, it seems like the main follow-up question. Right? That's the main issue.

MR. McINTURFF: Okay. Well -- so, no. The main follow-up question is -- again, we've got -- imagine you make a purchase and you get a receipt and the receipt has, you know, 15 or 20 pieces of data on that. We have that for all of the purchases times 114,000 accounts. And so imagine you're looking down at your receipt and you want to know when you look at the receipt, well, what plan am I on? Am I on the capped plan? Am I on the variable plan? Am I on the fixed plan? And then there's no data on the receipt. So we're saying, okay, so -- but on the receipt, it has some code, so we're saying --

so we asked the defendant what does this code mean and the defendant has responded. And we're making progress in that process. We're trying to decipher these codes. And then ultimately, again, we may have five or six -- it all depends on the numbers of codes that are in the data. We may have five or six different codes, five or six different categories of codes, where we say, you know, this code equals capped price -- in other words, not part of the case -- or this code equals variable price -- part of the case.

THE COURT: Okay. I get it. So you have code. It sounds like you have a couple of different iterations of data you're seeking. Right? And those are your follow-up questions.

MR. McINTURFF: Correct.

THE COURT: I'm just trying to understand.

MR. McINTURFF: Yes.

THE COURT: So you have some follow-up questions about these codes and, in addition to that, are you asking -- will those codes be sufficient -- the answers to those code questions be sufficient for you to tie individual contracts that you have?

MR. McINTURFF: We're hopeful.

THE COURT: Okay. So why don't we start there. I don't -- it seems to me that's where we are now. So the next step is, by the end of this week, send Mr. McLaughlin your

follow-up questions and whatever you want answered. Rather than a million iterations, start with those. Those are the questions that you're going to ask him.

Within a week, Mr. McLaughlin, so by December 8th, no later than December 8th, I want you to have responses to those questions or, if you can't, you know, I want you to meet and confer, be reasonable with one another, if there is a vendor issue or if there is some manual process that makes it hard for you to answer those questions within a week, but that will be the goal.

And then I want the parties to let me know by December 15th, by joint status letter, what progress you've made on reaching an agreement about these contracts and potentially proposing a stipulation.

MR. McLAUGHLIN: That's fine, your Honor. And I think we have been reasonable in terms of answering questions.

I guess I get a little concerned when we get questions like, well, you told the Court that there were 200,000 contracts -- there are -- there were in excess of that -- why do we only have a hundred and something thousand entries in the sales database system. That's -- I mean, they can ask that as part of discovery. They can ask a witness that. But I don't think that it's appropriate for us to be, you know, essentially providing testimony answers on these sorts of things.

Now, I -- so I'm happy to be reasonable. I think we have been, but -- and I know you've built into that either respond or, you know, confer and be reasonable, but, you know, I see that this has taken on a turn where we're getting -- you know, it's like -- it's not enough that we're producing the data. They basically want us to, you know, take on -- you know, answer additional interrogatories, effectively, or deposition testimony by counsel, and I think that goes too far. But we will be reasonable.

THE COURT: I think ultimately -- I think here's the thing. I think that the plaintiffs are reasonable in wanting to understand how specific charges in the database relate to the contracts you've produced so that they can propose a stipulation of some kind that can short circuit having to do blotter sampling of the contracts in your database. So that's what we're trying to achieve, a short-circuited approach that allows you all to not have to produce 200,000 contracts and analyze 200,000 contracts. It sounds like we should be able to get there based on your view that the language is not that different among a variety of contracts. The plaintiffs indication is that they seem to agree that there aren't that many variations. So it seems like the parties should focus on trying to answer those questions relating to the database that get you to an answer that ties the charges with at least the sample contracts that have been produced.

MR. McINTURFF: Your Honor, can I just respond on this issue about counsel's claim that we're seeking testimony from counsel.

We've issued discovery requests for charging data and if we've been given incomplete charging data, it's well within the ordinary meet-and-confer process to raise issues about discrepancies in the data with the producing party. They've repeatedly stated that they have 200,000 contracts. In fact, they stated now there's more than 200,000. The data should -- the data should reflect that. If the data is not reflecting it, it means the data that we've been produced is incomplete. That means that we've not gotten the adequate discovery we're entitled to. It's very simple. We're not trying to --

THE COURT: I understand your point, but I guess a better way to handle it would probably be just to say have you produced all of the data that you have, that 114,000, whatever they have in the database, and they can confirm if it's complete or not. The fact that he separately said there were 200,000 contracts, at the end of the day, they can only produce what they have and what exists. Right? That's their obligation under the rules. So ask them if it's complete. And I think Mr. McLaughlin can confirm whether they've produced all the data or not.

Now, you can make a separate argument later that says, well, there's a discrepancy. You said -- we seem -- we

have information that there are 200,000 contracts and, yet, only data for 114,000. That's true. You can raise that issue. But there's only so much we can do beyond that. If they say they've produced everything and that's what exists, you can then pursue that in depositions or in other ways to try to understand the discrepancy.

I understand your point. You're entitled to know that you have all the information you're entitled to. But raising -- and I think Mr. McLaughlin can answer those questions. But I don't know that he can then go a step beyond and then try to identify for you, after he said he's produced everything, why the discrepancy exists. Maybe he can, but I see his point that that might then lead to a fact question to ask a witness who's in charge of organizing that database or someone else.

So I'm not prepared to draw the line on this phone call because this is just one of many issues that you guys have raised. I think let's take it one step at a time. Put forward your follow-up questions, Mr. McLaughlin will do his best to answer them, with the goal of trying to lead you all to a stipulation that avoids production of 200,000 contracts that need to be analyzed so that you can tie certain contract pricing terms with individual charges in the database in an aggregate way that will allow you to have a stipulation. That should be the goal right now.

And both parties should meet and confer in good faith about this and not raise -- not cast dispersions upon one another about whether or not you're acting in good faith. I take it both parties are trying to act in good faith here and move the case forward. So let's just move forward from here.

By the end of this week, as I said, Mr. McInturff, provide your follow-up questions.

Mr. McLaughlin, do your best to answer them by December 8th.

By December 15th, the parties should send me a joint status letter letting me know where this issue stands.

What are the other issues? I know there are many, but this was a big one, I understand, dealing with the sampling and the exemplar contracts and a possible stipulation.

So, Mr. McInturff, is the next issue the ESI protocol?

MR. McINTURFF: Related. And I will gladly say that there aren't that many issues and we've made progress.

I think the next issue is actually defendant's response to our search term proposal from October 13th. So if your Honor would allow me, I can address that issue.

THE COURT: And to be clear, what is this search term proposal? Is it separate and apart from the sampling exercise? So it's not search terms to --

MR. McINTURFF: Correct, correct.

THE COURT: -- try to find contracts? It's a blotter search protocol for various custodians?

MR. McINTURFF: Correct.

It's our -- the defendant had represented previously that they wanted to focus on producing documents, so we -- and as agreed, we sent them search terms, and we have now been waiting seven weeks for a hit report and a response to those search terms. They told us on November 17th that they had finally agreed to run our search terms to provide a hit report, but it's been a week and a half since that time.

And again, our concern here is that we asked Judge Karas for eight months discovery extension and he sent us a very clear message that we only had five more months to complete all fact discovery. And so we had asked in our joint letter to your Honor last week that the Court order defendant to provide a hit report and a counterproposal to our search terms by November 28th, which was yesterday. We still haven't gotten a response.

Again, this is a very easy issue. We've actually worked with defendant's ESI provider in the past. It's Epic. You send Epic your search terms and they get back to you with a hit report in a day or two. And our search terms have been outstanding now since October 13th.

And when you combine this with the other issue that we would like to raise with your Honor, which is the defendant

not searching -- independently searching for and producing documents outside of the search term process, it leads to the result that we have today, which is the defendant has produced only 150, you know, discovery documents outside of sample contracts and database data and that that production occurred on July 18th and we haven't had a single document produced since then.

So the first step is to get defendant to respond to our search term proposal that, again, we sent seven weeks ago, on October 13th.

THE COURT: Okay.

Let me ask one follow-up question, which is, aside from -- when it comes to document production, is this protocol supposed to cover -- aside from I guess the issue you said which is outside of the protocol, you want defendants to be producing documents that they know exist in other locations separate and apart from the protocol, but is there any other -- there's the sampling issue and the exemplar contracts and then there's this protocol for document production. Would that cover -- once you agree on these search terms and protocol, cover all of the document production that's owed in this case?

MR. McINTURFF: To our knowledge today, yes.

THE COURT: Okay.

So, Mr. McLaughlin, what is the defendant's position? Why have you not responded to the search term proposal?

MR. McLAUGHLIN: Well, it's not true that we haven't responded, your Honor.

First of all, the parties agreed and it's -- I'm just frustrated to hear Mr. McInturff suggest that he sent us these search terms and he was expecting us to immediately get back to him. The parties agreed that we were holding off on underlying merits discovery until after the mediation next week. And we were focused on what they needed -- what each side needed to be able to go in to the mediation next week and be able to assess the case. And that's what we have been focused on. So it's not true that we've been sitting on our hands and not responding to their protocol.

What we did instead was the -- the ESI protocol contemplates that they propose search terms, we respond. That would include proposing to narrow the search terms, additional search terms, whatever we want. What we said was we will -- rather than engage in that process in the front end, we'll run all of your search terms and then we'll have a discussion based on the hit count to see where it makes sense to narrow it. And that's what we're prepared to do.

The issue is we are -- so if your Honor recalls, we agreed to a very sweeping database collection, or document collection. We have essentially collected the company's entire share drive, which is, you know -- as well as the e-mail -- or the mailboxes of the relevant custodians and sent it to our

vendor to be able to process and run these searches. There is terabytes of data that have been transferred and is still being transferred. This has taken weeks to get the data transferred because it's so voluminous. And our vendor, as of yesterday, when we asked, is still not done with the transfer and processing to be able to run the search terms. It's not because anybody's delaying. It's because we are dealing with such a huge volume of data. As soon as that's done -- they have the search terms that plaintiff has proposed. They have been instructed to run them and give us the hit report. Nobody's -- we're not delaying on that front. That is what was called for in the ESI protocol that we're hopefully going to finalize shortly, but we haven't delayed doing anything while we negotiate the final points on that. It just takes time. We've got a lot of volume of data. It's being processed. And we'll run the search terms. And so we're -- we've been consistent on that front. And so we're prepared to give them the hit report as soon as we have it. We just can't -- you know, I can't get it from our vendor if they don't have it for me.

THE COURT: And do you have any update as to -- or any more precise timing for when you'll get your initial hit report?

MR. McLAUGHLIN: I asked. I don't. I mean, it's just that it takes -- the data -- the loading -- it takes --

they can't give me any definitive estimate. They are -- they are hoping it will be done this week, but they -- you know, it really depends on how it comes in and is processed. So I would be hopeful that it will be done this week and that we could run search terms next week. I just can't -- I can't promise that because I'm not the one doing it. And they're not -- I mean, it's kind of an automated process for it to load.

THE COURT: And the search term process -- so this is a data transfer issue. You haven't even run the search terms, it sounds like.

MR. McLAUGHLIN: Correct.

THE COURT: Okay.

MR. McLAUGHLIN: But that part is the easy part.

THE COURT: That part would be easy. Okay.

MR. McLAUGHLIN: Right.

THE COURT: Okay.

MR. McLAUGHLIN: But there's a lot of search terms. I mean, they've asked us -- they have, I mean, you know, pages of search terms, over a hundred -- I think 140 search terms that they're asking us to run. So it's -- you know, there are quite a few terms that -- and so I suspect the volume is going to be fairly large and we're going to have to negotiate that once we get the hits, but we're not delaying in getting them the hits.

THE COURT: Okay. And then once you agree upon the

search terms, you'll have to do some meeting and conferring, it sounds like potentially, if it's too voluminous. What's your view on how long it would take for them to produce documents after you have agreed-upon search terms? Do you have any sense of that?

MR. McLAUGHLIN: I think it really largely depends on the volume under the ESI protocol. There's language that, depending on the volume -- you know, there is the option to discuss doing predictive learning versus sort of manual review of documents. So I think it's going to depend on what we agree the universe of documents will be.

I mean, again, we can start -- either way, we can -- I expect we will do rolling productions, and so we're not going to delay in starting that. I can't give you an end date on how long it will take because we just don't know how much volume we're talking about yet.

THE COURT: And so the discovery deadline in this case, as extended by Judge Karas, at least for fact discovery, is April 18th of next year and then expert disclosures in September.

I guess in terms of depositions, how much time -- you obviously, after documents are produced, Mr. McInturff, will want a certain number of months to proceed with depositions, so are there -- I'm assuming that's the case. You're not going to be able to proceed with depositions until the documents are

produced or are there some depositions that can proceed even without documents?

MR. McINTURFF: Unlikely. We don't know at this point because we've only had 150 documents produced, but we'll -- to the extent we can begin depositions once we get productions, we will, but, in my experience, it's very rare that we proceed with depositions until we've reviewed at least the lion's share of the document discovery.

THE COURT: Okay.

MR. McLAUGHLIN: And, your Honor, just -- I don't mean to be -- Mr. McInturff can't help himself but say that. A hundred and fifty documents doesn't account for the 400 plus contracts we've produced, doesn't include the probably millions of lines of data that we've produced in electronic format. So it's just not true that we have produced 150 documents and then done nothing in terms of discovery.

THE COURT: Okay.

So in terms of -- it sounds like, though, the protocol itself is something you both have negotiated and will be submitted to the Court soon. Is that true? The protocol itself.

MR. McINTURFF: So the protocol was another issue which was raised in our status letter. Yesterday afternoon, defense counsel gave us another term. We returned a draft to them late last night. At this point, there is one dispute and

two issues remaining. The ball is in plaintiff's court on one issue and the ball is in defendant's court on the other issue. We've already set up a call for 2:00 this afternoon with our ESI consultant to discuss the issue that the defendants had raised.

One way or the other, we have one crystalized dispute. We should have the other two issues worked out by the end of the week. I believe that plaintiffs can respond to the issue that the ball is in our court on by close of business tomorrow. We would hope that the defendant could respond to the issue that is in their court by close of business tomorrow. And then we either submit an ESI protocol that contains what is not in dispute for your Honor's endorsement or submit ESI protocol with the couple of -- you know, one or two concrete disputes and then ask the Court to rule.

But, critically, none of the disputes are preventing the parties from moving forward. And I will say defense counsel had not disclosed to us that they hadn't loaded the data. That is news to us. We, in fact, understood as of September 29th that Hop had made disclosures about the size of the custodial and noncustodial data sources that were collected, which is why, on October 13th, we proposed search terms. So, to be honest, I don't understand how it's taken this long, but we are where we are.

But on the ESI protocol, we expect to be able to

submit something, if not an agreed-upon version for the Court to endorse, then we can supplement with a couple of issues, or a more complete version where we ask the Court to rule on whatever remaining disputes we have, but we should be able to do that in short order.

THE COURT: Okay. I'm not going to set a deadline for the ESI protocol to be submitted to me. I'll leave it to the parties to try to work out the remaining issues and to decide, if you're at an impasse, whether you actually want Court intervention and have me just decide it for you.

The same goes for the search terms. I'm not going to set a clear deadline for that, but what I will say is that I expect Mr. McLaughlin to push his vendor to work as quickly as possible to get the data loaded so that the search terms can be applied. And I want that issue to be addressed in the joint status letter that you send me on December 15th.

At that point, I have an eye towards what your discovery deadlines are, so we're going to have to address in short order setting some deadlines after that for substantial completion of documents and the like so that the parties can then start scheduling depositions and be ready -- and to be done with depositions and all fact discovery by mid-April. So that will probably have to be done in short order, after the parties work through search terms. So that is -- I will be keeping a short leash on the process to make sure that the

deadlines don't slip.

Are there any other issues that need to be addressed today?

Mr. McInturff?

Mr. McLaughlin?

MR. McINTURFF: Yes, your Honor. This is Burkett McInturff.

That raises the last issue, which is certainly tied into the timing issue, which is we found out on November 10th that defendant's new lawyers are taking the position that they do not have an independent obligation to search for and produce documents outside of the search term process that was agreed to in the ESI protocol. And as we said in our joint submission to your Honor, first of all, this was agreed to in writing with prior defense counsel on June 21. The production of 150 documents that I've referred to occurred on July 18th, just before the defendant changed counsel. Again, we haven't gotten a production of those documents -- of documents like that since July 18th. It's well settled that a search terms protocol does not relieve a party of an independent duty to search for -- to perform a reasonable search for documents that can be located through reasonable traditional means.

I'll also add that, at the October 31st conference, if your Honor will recall, we had issued an interrogatory asking that the defendant identify the categories of data and

documents that it relies on and references in setting variable rates and your Honor ordered, instead of -- for defendant, instead of responding to that interrogatory, that defendant would identify the Bates numbers of the documents it was going to produce that are responsive to that interrogatory. Again, no documents have been produced, so we haven't gotten that information.

And then finally, on October 13th, in reviewing this production from July 18th, we identified to defense counsel certain categories of documents that involve changes to Hop's heating oil prices and explaining those changes. It's a discrete category of documents. And we reached out to defense counsel and asked if they would go ahead and produce those documents. We did not get a response. And then we found out on November 10th, after Judge Karas had put us on a much tighter discovery leash, that defendant is taking the position that it can essentially rely on the search term process. And again, that is not consistent with the case law and it is especially prejudicial to plaintiff given the discovery schedule.

So we would ask that your Honor direct defendant to interview their custodians, perform a reasonable search, and begin producing documents responsive to our discovery requests in the near term, while the parties work out the search term protocol.

As an added benefit to negotiating search terms, when we have a decent size document production of documents that can be located at hand, it allows the parties to focus their search term discussion. At this point, with 150 documents, we're having to rely on our past experience in other cases. It's a much less tailored project. So it will also help streamline search term negotiations if the defendant would discharge its duty, interview its people, find the documents that they can find through traditional means and produce them promptly.

THE COURT: Mr. McLaughlin.

MR. McLAUGHLIN: Your Honor, may I respond?

THE COURT: Yes. Of course.

MR. McLAUGHLIN: So the communications that Mr. McInturff sent to us with respect to prior counsel involved prior counsel's efforts to identify certain folders that existed on the share drive where it was likely documents that would be relevant to the claims in this case could be found after discussing those folders with custodians. We've also had those discussions.

The issue was and what we discussed on the last call was there's not a great -- all of the -- all of the relevant material exists on the share drive or in the mailboxes or in the sales database. They've got the sales database. We've identified the custodians that we're going to search mailboxes of and we have captured the entire share drive to run search

terms through.

The notion that we have an obligation to run an initial round of search terms separate and apart from the search terms that the parties are going to negotiate, I mean, I don't think there's support there. We're not talking -- there are no -- it's not like there are paper files here, which I would agree we would have an obligation to review and produce if they didn't exist in an electronic format as well. That's not the case here.

So I don't know why we're talking -- I mean, we are trying to get to the point and we're -- I just heard your Honor, you know, give us the instruction, which I've already given, but I will reiterate to our vendor that this needs to be the priority as soon as the data is loaded to run the search terms so that we can start negotiating and reviewing those potentially responsive documents. To add another layer is just another, to me, waste of time and energy and it's totally inefficient. They have captured -- I'm happy to share the proposed search terms, your Honor, that plaintiff has -- I don't think there is a category that is not represented by the broad search terms that they've requested that -- where they would expect us to do an additional investigation to capture documents. I think -- and it's in my experience -- this is the normal course. We run search terms to the extent we are capturing all of the relevant -- you know, the relevant

universe of responsive documents and we use the search terms to capture the relevant documents in that universe, and that's exactly what's going to happen in this case.

THE COURT: And is there any set of readily identifiable documents like the ones that plaintiff references in their letter, the joint status letter, that can be obtained short of search terms that wouldn't be duplicative of your search term efforts?

MR. McLAUGHLIN: I don't believe so because what I remember -- what I recall him referencing was running searches for certain e-mails that were routinely sent and those searches will be run through the e-mails in the normal course. I just think it's going to be inefficient to -- I'm not aware of any to answer your question.

THE COURT: Okay. And in terms of these custodial interviews that defendants are proposing, was that something that you did as part of identifying what share drives to search, for example, or, rather, which folders on the share drives to search for purposes of the search terms?

MR. McLAUGHLIN: Yes. So we certainly spoke to custodians, but where we erred on the side of over-inclusiveness. Is we agreed to literally pull the company's entire share drive. We didn't limit it to the custodians that we both identified and agreed with the relevant custodians whose mailboxes we were going to search. We are

pulling, which is part of the problem, why it's taking long, the company's entire share drive. So it is going to capture, you know, everything that exists at the company regardless of if it was maintained by the particular custodian.

THE COURT: Okay. So, in general, the way I view defendant's obligation here is that it's defendant's obligation to produce responsive documents in response to plaintiff's requests, but it is not my role to tell defendants how best to meet those obligations. It's up to defendants to decide how they want to identify responsive documents and produce them. They certainly have an obligation to do that and to find all responsive documents subject to whatever objections they might make, but I'm not going to be in a position to tell defendants how best to conduct those searches to produce those documents that respond to the discovery requests and that meet their discovery obligations.

So, at this stage, I'm not going to order defendants to do a separate production of documents, separate and apart from the parties' search term negotiations, absent information or a reason to believe that there are documents outside of those search terms that could be readily identifiable and produced.

So, at this point, I want the parties to focus on producing the sample -- producing the documents and reaching an agreement on the sample contracts and the follow-up questions

that plaintiff has, identify -- running search terms so that you can negotiate the documents that are going to be produced across all custodians, and to do that as soon as possible.

As I mentioned, I will want an update on all of this in the joint status letter on December 15th.

If all of this -- my view on not ordering the defendants to do more at this point is based on my understanding that the search terms will be run as soon as possible and that document productions will begin on a rolling production shortly after the parties agree upon the search terms to be applied and that all of this will be done quickly enough to allow the parties to meet the ultimate fact discovery deadline of April -- I guess it's April 18, I believe, 2024. And as I mentioned, I will be checking in with the parties on a very regular basis to make sure that that deadline doesn't slip and that the documents get produced as soon as possible so the parties can begin depositions.

If, at some point, it looks like documents aren't getting produced quickly enough and the parties aren't reaching agreement, I will set strict deadlines and may change my view about ordering defendants to conduct more limited searches and specific documents with specific custodians to speed up the process. At this point, I don't believe that's necessary.

So is there anything else that needs to be addressed today?

MR. McINTURFF: Not from plaintiffs, your Honor.

THE COURT: Okay.

Mr. McLaughlin.

MR. McLAUGHLIN: Nothing from defendants. Thank you, your Honor.

THE COURT: Okay. Great.

So I will wait to hear from the parties by joint status letter on December 15th in hopes that you've made progress towards reaching a resolution on these issues. If not, obviously I will quickly schedule another conference and we will try to work through that and address them as soon as possible.

I also wish you luck at your mediation on December 7th. That is the date, correct?

MR. McINTURFF: Correct. Thank you, your Honor.

MR. McLAUGHLIN: Correct.

THE COURT: Okay. So, for now, we will adjourn without a conference date. I'll decide the next conference after hearing from the parties on December 15th.

MR. McLAUGHLIN: Thank you, your Honor.

MR. McINTURFF: Thank you, your Honor.

THE COURT: Okay. Thank you. Have a good day.
